No. 83-1572

In The

Supreme Court of the United States
October Term, 1984

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William Flannery,
Committee for Michael George
Flannery,

Petitioner

v.

United States of America,

Respondent

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fourth Circuit

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No. _____

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Supreme Court of the United States

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WILLIAM FLANNERY,
COMMITTEE FOR MICHAEL GEORGE
FLANNERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of
Appeals For The Fourth Circuit

QUESTIONS FOR REVIEW

(1) Whether an award of damages to a comatose plaintiff for loss of enjoyment of life, an element of the permanency of the injury, is punitive and therefore, not allowable under the Federal Tort Claims Act?

(2) Whether in this case income taxes should be deducted from lost future earnings under the Federal Tort Claims Act?

(3) Whether an award of lost earnings to a comatose plaintiff should be reduced by the amount of future medical expenses?

Table of Contents

	Page
Questions For Review	1
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement Of The Case	3
Argument	5
Conclusion	8
Appendix To Brief	1a

Table of Authorities

A. Cases

Barnes v. United States,
685 F. 2d 66 (3rd Cir. 1982) 8

Felder v. United States,
543 F. 2d 657 (9th Cir. 1976) 7

Flannery v. United States,
718 F 2d 108 (4th Cir. 1983) 2, 5, 7

Flannery v. United States,
297 S.E. 2d 433 (W.Va. 1982) 2, 5, 2a, 9a, 10a

Flannery v. United States,
649 F. 2d 270 (4th Cir. 1981) ..... 2, 4, 20a.

Jordan v. Bero,
210 S.E. 2d 618 (W.Va. 1974) 8, 15a,

Kalavity v. United States,
584 F. 2d 809 (6th Cir. 1978) .....

B. Other Authorities

Comment, Nonpecuniary Damages for Comatose Tort
Victims, 61 Georgetown L.J. 1547 (1973) 5

OPINIONS BELOW

The memorandum Opinion and Order of the United States District Court of the Southern District of West Virginia was entered on January 22, 1980, a copy of which is included in the Appendix at Appendix D, page 36a.

After initial briefing and argument on appeal, the Fourth Circuit of Appeals certified questions of state law to the Supreme Court of Appeals of West Virginia. *Flannery v. United States,* 649 F. 2d 270 (4th Cir. 1981), a copy of which is included in the Appendix at Appendix C, page 30a.

The Supreme of Appeals of West Virginia answered the certified questions. *Flannery v. United States,* 297 S.E. 2d 433 (W.Va. 1982), a copy of which is included in the Appendix at Appendix B, page 15a.

The matter was rebriefed and reargued before the Fourth Circuit of Appeals. *Flannery v. United States,* 718 F. 2d 108 (4th Cir. 1983), a copy of which is included in the Appendix at Appendix A, page 1a.

JURISDICTION

The Fourth Circuit of Appeals denied rehearing on December 27, 1983, (Appendix E, *p. 47a.*) and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2101(c).

STATUTES INVOLVED

28 U.S.C. 1346 (b) and 28 U.S.C. §2674 as more fully set forth in Appendix F, page 48a.

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act, 28 U.S.C. §§1346 (b) and 2647, seeking damages for personal injury as a result of a motor vehicle collision.

Michael Flannery[1] suffered severe brain damage as a result of the collision. He is presently, and has been since the collision, in a "permanent, irreversible comatose state."

Finding the United States liable[2], the District Court awarded Michael Flannery $48,174.80 for past medical expenses, $316,984.00 for future medical expenses, $535,855.00 for impairment of earning capacity, and $1,300,000.00 for *"loss of the ability to enjoy life,"* a total award of $2.2 million.

On appeal, the United States conceded the awards for past and future medical expenses, and conceded the propriety of an award for impairment of earning capacity, and the gross amount of such award as found by the District Court.

The United States contested the award of impairment of earning capacity only to the extent that it reflected the lost future gross earnings which had not been reduced to reflect the incidence of income taxes.

The United States contested the award for *"loss of the ability to enjoy life"* on the grounds that it was improper under State law, was excessive, and was punitive under the Federal Tort Claims Act.

The Fourth Circuit Court of Appeals, *Flannery v. United States*, 649 F. 2d 270 (4th Cir. 1981), certified two questions to the Supreme Court of Appeals of West Virginia.

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[1] The sole plaintiff is Michael Flannery. The action was brought by William Flannery, Michael's father, in a representative capacity.

[2] The District Court found the collision was caused by the negligence of a government employee, William Willien, in driving through a red traffic light, while acting within the scope of his employment.

1. Under West Virginia law, is a plaintiff in a personal injury action, who has been rendered permanently semi-comatose by his injuries and is therefore unable to sense his injuries, entitled to recover for the impairment of his capacity to enjoy life?

2. Under West Virignia law, must the trial court, when sitting as the finder of fact in a personal injury action, deduct from the plaintiff's award for lost earning capacity an amount equal to the federal income taxes which would have been levied upon such income had it actually been earned?"

The Supreme Court of Appeals of West Virginia, *Flannery v. United States*, 297 S.E. 2d 433 (W.Va. 1982), answered the first question in the affirmative and the second in the negative.

The Fourth Circuit Court of Appeals, *Flannery v. United States*, 718 F. 2d 108 (4th Cir. 1983), ruled that the award for loss of enjoyment of life to the comatose plaintiff[3] was punitive since the plaintiff could not spend the money, nor experience the pleasure of giving it away.

Relying on wrongful death cases decided under the Federal Tort Claims Act, the Court deducted income taxes from lost future earnings.

Finally, finding the award of lost of future earnings not to be compensatory, the court ordered it reduced by the amount of future medical expenses.

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[3] Comatose tort victims raise issues as to whether awareness of the injury or loss is neccessary for recovery; and whether it is neccessary for the victim to be able to personally spend money damages awarded. Comment, Nonpecuniary Damages for Comatose Tort Victims, 61 Georgetown L.J. 1547 (1973).

ARGUMENT

I.

Whether an award of damages to comatose plaintiff for loss of enjoyment of life, an element of the permanenency for the injury, is punitive, and therefore not allowable under the Federal Tort Claims Act?

The definition of compensatory and punitive damages under the Federal Tort Claims Act rendered in *Flannery v. United States*, 718 F. 2d 103 (4th Cir. 1983) is in conflict with a decision of the Sixth Circuit Court of Appeals in *Kalavity v. Un..ed States, 584 F 2d 809 (6th Cir. 1978). The definition of compensatory and punitive damages under the Federal Tort Claims Act, is a question of federal law which should be settled by this court.*

In Kalavity v. United States, supra, the Court refused to reduce damages in a wrongful death action under the Tort Claims Act because the widow had remarried.

The United States had argued that since the plaintiff's remarriage entitled her to support and companionship of a new spouse, any award for loss of support and affection would be "punitive."

In defining punitive damages, the Court held, "In excluding 'punitive' damages from the coverage of the Tort Claims Act, we believe that Congress simply prohibited use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together." *Kalavity v. United States*, 584 F 2d 809, 811 (6th Cir. 1978).

Title 28, United States Code, Sections 2674 and 1346 (b) provide for liability of the United States in the same manner and the same extent as a private individual, except that the United States shall not be liable for punitive damages.

The law of West Virginia allows a permanently semi-comatose person to recover for loss of capacity to enjoy life. It is to be viewed objectively as a measure of the permanency of the injury. *Flannery v. United States*, 297 S.E. 2d 433 (W.Va. 1982).

The Federal Tort CLaims Act contains no definition of "punitive damages." The legislative history of the Act, likewise provides no definitive answer[4].

The purpose of awarding damages is to compensate for injury and resultant losses. The fact that the plaintiff is unaware of his injury does not render an award of damages non-compensatory. There can be no doubt that the plaintiff has been reduced to a "permanent, irreversible comatose state." An injury has been inflicted, and an award of damages is not punitive.

II.

Whether in this case income taxes should be deducted from lost future earnings under the Federal Tort Claims Act?

The matter of the deduction of income taxes in Federal Tort Claims Act cases is also the subject of conflicting decisions in the appellate courts.

Kalvity v. United States, 584 F. 2d 809 (6th Cir. 1978) (error in deducting income taxes in the lower or middle reach of the income scale); *Felder v. United States*, 543 F. 2d 657 (9th Cir. 1976)(failure to deduct income tax constitutes an award of punitive damages against the United States); *Flannery v. United States*, 718 F. 2d 108 (4th Cir. 1983)(federal law mandates deduction of income taxes).

In this case. the District Court in its Memorandum Opinion noted "...the evidence at trial was not properly developed in a manner that would enable this Court to make a finding as to the plaintiff's potential tax liabilities."

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[4] *Felder v. United States*, 543 F. 2d 657, 667-669 (9th Cir. 1976) (reviewing legislative history).

The failure of the United States to produce sufficient evidence upon which to base a calulation as to the appropriate reduction for income taxes, mandates that no deduction be allowed. *Barnes v. United States*, 685 F. 2d 66 (3rd Cir. 1982).

The Federal Tort Claims Act specifically incorporates state law, and the law of the State of West Virignia in a personal injury action does not require the deduction of federal income taxes, even in an action tried to the Court.

III.

Whether an award of lost earnings to a comatose plaintiff should be reduced by the amount of future medical expenses?

On appeal, the United States condeded the propriety of an award for impairment of earning capacity, and the gross amount of such award as found by the District Court. It contested the amount of the award only to the extent that it had not been reduced to reflect the incidence of income taxes.

Although the question was not raised by the United States, the majority panel ruled that the award for lost earnings must be reduced, because in their view it in part duplicated the award of future medical expenses.[5]

The law of the State of West Virginia provides that future medical expenses and the impairment of earning capacity are proper *separate* elements of recovery, in a personal injury action. *Jordan v. Bero*, 210 S.E. 2d 618, 636 (W.Va. 1974).

The majority decision departs substantially from state law, and interjects as a factor of recovery, the plaintiff's use of damages awarded.

No other court has adopted it.

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[5] The majority opinion does not label the asserted duplication as either plain error or punitive damages, and departs substantially from the rule that appellate courts will not address errors not properly raised and preserved in the trial court.

CONCLUSION

For the foregoing reason, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, counsel for Petitioner, and a member of the Bar of this Court, hereby certifies that he has served three copies of the foregoing Petition for a Writ of Certiorari upon the following counsel by depositing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed as follows:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

The undersigned further certifies that all parties required to be served have been served.

Done this _____ day of March, 1984.

_____
Raymond L. Hampton, II
P.O. Box 402
Huntington, West Virginia 25708
(304) 529-2434

ENTRY OF APPEARANCE

The undersigned hereby enters an appearance as counsel of record for petitioner.

_____
Raymond L. Hampton, II

APPENDIX A

No. 80-1563

William Flannery, Committee
for Michael George Flannery,
Appellee,

versus

United States of America
Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Charles H. Haden, II, Chief District Judge.

Argued April 11, 1983 — Decided September 21, 1983

Before WINTER, Chief Judge; HALL, Circuit Judge; and HAYNSWORTH, Senior Circuit Judge.

Marc Johnston, Civil Division, Dept. of Justice (Alice Daniel, Assistant Attorney General; Robert B. King, United States Attorney; Anthony J. Steinmeyer, Civil Division, Dept. of Justice on brief) for Appellant; Ray L. Hampton, II (Lafe C. Chafin, Barrett, Chafin, Lowry & Hampton on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

The Plaintiff, a twenty-two year old man, became permanently comatose as a result of extensive brain damage suffered in an automobile accident later determined to have been caused by the negligence of the driver of the other vehicle who was a federal employee on official business. After a trial of this action, brought under the Federal Tort Claims Act, the court awarded damages of approximately $2,200,000 consisting of $48,174.80 for medical expenses incurred before trial, $316,984 for future medical expenses, $535,855 for impairment of earning capacity, and $1,300,000 for *"loss of the ability to enjoy life."*

On appeal, the United States does not question the determination of its substantive liability. It does question the calculation of damages.

I.

When the case first came before us, we perceived the questions presented as principally to be determined as a matter of state law. There was a recently enacted statute in West Virginia authorizing the Supreme Court of Appeals of that state to accept and answer questions of West Virginia law certified to it by a federal court. We certified the two principal questions to the Supreme Court of Appeals of West Virginia without appreciating at the time that federal questions lurked in the case. The West Virginia Supreme Court of Appeals gave us a prompt response,holding that, as a matter of state law, the damages for loss of capacity to enjoy life were properly allowed notwithstanding the fact that the plaintiff has no awareness of his loss, and that no deduction of federal income taxes should be made in calculating the amount of loss of future earnings. *Flannery v. United States,* 297 S.E. 2d 433 (W.Va. 1982).

We should have first addressed the federal questions lurking in the case. We would have done so except, at the time, we failed to appreciate their presence.

II.

Under 28 U.S.C. §2674 of the Tort Claims Act, damages generally are determinable under state law, for the United States is to held liable *"to the same extent as a private individual under like circumstances."* But there is a qualification, the relevance and importance of which is now clearly apparent. Punitive damges are not allowable. The Federal Tort Claims Act is a waiver of immunity from suit of the United States, and conditions attached to the waiver must be strictly enforced. The government's immunity is waived insofar as compensatory damages may be determined and awarded. The door for the assertion of private tort claims in federal courts is opened that far, but then the question arises about the allowability of damages treated and labeled under state law as "compensatory" which are in excess of those necessary to provide compensation for injuries and losses actually sustained.

The question of the allowance of such damagaes is one of federal law. What is compensatory and what is punitive, within the meaning of the statute, is related directly to the extent of the waiver of sovereign immunity. How widely the Congress intended to open the door is not a matter to be resolved under the widely varying laws of the fifty states, but under a uniform standard. Thus, as was said in *D'Ambra v. United States,* 481 F. 2d 14 (1st Cir. 1973), a states statutory measure of damages *"must be judged by its language or the state's characterization, but by its consequences."*

D'Ambra was a wrongful death action for the death of a child in Rhode Island. The Rhode Island statute provided an award to the decedent's parents of an amount computed in terms of the economic loss to the decedent. That bore no relation to the actual loss suffered by the parents. Since damages under the Rhode Island statute were not to be determined by an assessment of the loss suffered by the survivors, a damage award under the statute was held to be punitive and impermissible under the FTCA.

Similarly, it has now been repeatedly held that federal income taxes must be deducted in computing lost future earnings, notwithstanding the fact that such deductions are not permitted under state law. *Harden v. United States*, 688 F. 2d 1025 (5th Cir. 1982): *Felder v. United States*, 543 F 2d 657 (9th Cir. 1976); *Hartz v. United States*, 415 F. 2d 259 (5th Cir. 1969). A living person, with earnings subject to federal taxation, may spend only his net income after taxes, and an award to a plaintiff for lost future earnings based upon lost gross earnings gives the plaintiff more than is truly compensatory. As the court pointed out in *Fedler* the punitive nature of the award based upon a computation of lost gross earnings is particularly apparent when the defendant is the taxing authority.

The FTCA's proscription of awards of punitive damages authorizes only those awards that compensate or reimburse, or provide recompense or redress for injuries suffered by the claimant. To the extent that an award gives more than the actual loss suffered by the claimant, it is *"punitive"* whether or not it carries with it the deterrent and punishing attributes typically associated with the word *"punitive."*

III.

There is no doubt that Flannery has lost *"his capacity to enjoy life."* He is conscious of nothing and incapable of enjoying anything. In his condition, he is quite susceptible to infections, but with proper care he may have a life expectancy of as much as thirty years from the date of his injury. There is no likelihood whatever that he will ever become aware of anything.

The Supreme Court of Appeals of West Virginia held that, as a matter of state law, damages for the loss of the capacity to enjoy life were assessible upon an objective basis, and it did not matter that this particular plaintiff is unaware of his loss. It is perfectly clear, however, that an award of $1,300,000 for the loss of enjoyment of life cannot

provide him with any consolation or ease any burden resting upon him. The award of the cost of future medical care provides for his maintenance as well as his nursing and professional care. It provides all of the money needed for the plaintiff's care, should he live out his life expectancy. He cannot use the $1,300,000. He cannot spend it upon neccessities or pleasures. He cannot experience the plesure of giving it away. If paid, the money would be invested and the income accumulated until Flannery's death, when it would be distributed to those surviving relatives of his entitled to inherit from him. If it is compensatory in part to any one, it is compensatory to those relatives who will survive him.

Since the award of $1,300,00 can provide Flannery with no direct benefit, the award is punitive and not allowable under the FTCA.

IV.

We have already adverted to the decisions holding that federal income taxes must be duducted in computing lost future earnings, at least when the earnings are substantial. They are entirely consistent with the holding of the Supreme Court that such an adjustment must be made in a wrongful death action brought under the Federal Employers Liability Act, *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980); see also *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473 (1981). They are consistent with other cases requiring such deductions in actions brought under the Longshoremen's and Harbor Worker's Compensation Act and admiralty cases. *Fanetti v. Hellenic Lines, Ltd.*, 678 F. 2d 424 (2nd Cir. 1982), *Sauers v. Alaska Barge*, 600 F. 2d 238 (9th Cir. 1979). As the Supreme Court observed in *Jones & Laughlin Steel Corp. v Pfeifer*, 51 U.S.L.W. 4795 (U.S. June 15, 1983), "Since the damage award is tax-free, the relevant stream is ideally of *after-tax* wages and benefits." (Emphasis in original).

The lost earnings projections employed generous figures. Flannery had been attending college for three years, but he had completed so few courses he was ranked only as a sophomore. On the afternoon preceding the evening when he was so tragically injured, he earned $16 working in a filling station, and that constituted his complete employment history. Nevertheless, the projections accepted by the district judge were that he would earn from $17,481 in 1978 to $182,795 in 2017, plus about 35% of those figures in fringe benefits and "supplemental income."[1]

The United States has requested an adjustment for income taxes on the basis of a flat 10% deduction. That is a very conservative estimate. On the basis of current tax tables, a single taxpayer earning $17,481 a year would pay more than that. One earning over $182,000 would have a current tax liability of over 40%. Discounting at the flat rate of 10%, however, has the viture of simplicity. Since the United States requested no more, we think its suggestion should be accepted.

V.

The plaintiff contends that if an adjustment is made for income taxes upon estimated future earnings, an adjustment should be made for the income taxes payable on income on invested funds after the judgement is paid. We reject the contention, for it is unkown how the fiduciary who will handle the funds will invest them. It could invest them in whole or in part in tax exempt securities. We find no basis for an adjustment for a tax liability which is avoidable and may never be incurred.

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[1] The very large figures for later years were properly discounted for an increasing likelihood that he would not have remained in employment so long.

VI.

Except for the tax adjustment it seeks, the United States does not question the award for lost future earnings. In many cases, such an award is clearly compensatory and useful to provide for a claimant's subsistence and that of his dependents. A question arises in this case, however, for the judgement already requires the United States to pay a sum calculated to provide for the plaintiff's living expenses throughout the remainder of his life, should he live out his life expectancy.

The question has not been raised by the United States, but we feel compelled to reduce the award for lost earnings because, in part, it duplicates the award of future medical expenses.

An award of lost earnings is made to an incapacitated plaintiff so that he may provide for himself and his dependents those necessities, comforts and niceties he would have provided out of his earned income had he not been injured. In an FTCA wrongful death action, the survivors are entitled to an award based upon lost future earnings of the decedent only after a deduction of the decedent's estimated living expenses, for the survivors are entitled to no greater benefit than they would have enjoyed had the decedent lived and continued working. *Hartz v. United States*, 415 F. 2d 259 (5th Cir. 1969). A successful plaintiff is entitled to be made as financially secure as he would have been had there been no injury or death, but no more..

In the usual case, a plaintiff must pay his own living expenses, though an award for lost earnings may be the source of his funds. In this case, however, the plaintiff will be required to pay nothing, for the award of future medical expenses includes all of the personal expense that the plaintiff will incur. Indeed, the testimony was that, in the future, he will need little skilled medical care. His personal expenses will be to provide himself with housing, food, and nursing and custodial care of the kind provided in a nursing home. That is the expense covered by the award for future medical expense. The label should not be

permitted to mislead us, for, in truth, the judgement requires the United States to pay the plaintiff's personal living expenses twice. Thus, the award for lost earnings, as finally determined, should be reduced by the amount of the award for future medical expenses.

VII.

The judgement is vacated and the case remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

HALL, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that the damages awarded Flannery for loss of enjoyment of life fall within the punitive damage proscription of the FTCA. Nor can I agree that the award for lost future earnings is punitive or otherwise improper because of the failure to deduct federal income taxes. In my view, these aspects of the damages award are a matter of state law, which have been conclusively resolved in Flannery's favor by the decision of the West Virginia Supreme Court of Appeals in *Flannery v. United States*, _____ *W.VA.*_____, 297 S.E. 2d 433 (1982). I can only conclude that this decision of the West Virginia Supreme Court is binding upon this Court. Finally, I disagree with the majority's conclusion that the award of lost earnings should be reduced on the ground that it partially duplicates the award of future medical expenses. For these reasons, I must vigorously dissent pursuant to the FTCA.

It is undisputed that, as a result of the government's negligence, twenty-two year old Michael Flannery was rendered permanently and totally disabled and, as the district court found, *"will remain in a semi-comatose state for the remainder of his life."* He is not expected to live beyond the year 2008 and this is contingent upon his receipt of constant custodial and good nursing care.

As the majority opinion notes, the only issue on appeal is the calculation of damages. In a personal injury action, such as this one, brought pursuant to the FTCA, damages are a matter controlled by state law. Under the provisions of 28 U.S.C. §2674, *"(t)he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages."* 28 U.S.C. §1346(b) further states that:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the

> Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claiment in accordance with the law of the place where the act or omission occurred.

When this case first came before us on appeal, we perceived — in my opinion, correctly — that the damages question was a matter of state law, which required clarification from the West Virginia Supreme Court of Appeals. Pursuant to our earlier opinion in this case, *Flannery v. United States*, 649 F. 2d 270 (4th Cir. 1981), we, therefore, certified the following two questions to the West Virginia Supreme Court of Appeals:

> 1. Under West Virginia law, is a plaintiff in a personal injury action, who has been rendered permanently semi-comatose by his injuries, and is therefore unable to sense his injuries, entitled to recover for the impairment of his capacity to enjoy life?.
>
> 2. Under West Virginia law, must the trial court, when sitting as the finder of fact in a personal injury action, deduct form the plaintiff's award for lost earning capacity an amount equal to federal income taxes which would have been levied upon such income had it actually been earned?

The answers which we received from the West Virginia Supreme Court of Appeals were as follows:

> 1. We ... hold that a plaintiff in a personal injury action who has been rendered permanently semi-comatose is entitled to

> recover for the impairment of his capacity to enjoy life as a measure of the permanency of his injuries even though he may not be able to sense his loss of enjoyment of life. *Flannery v. United States*, _____ W.VA. _____, 297 S.E. 2d at 439.
>
> 2. (W)e adopt the majority view and hold that in computing the loss of future earning capacity a deduction need not be made for federal income taxes. _____, 297 S.E. 2d at 441.

Under the Rules of Decision statute, 28 U.S.C. §1652, "(t)he laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." In my opinion, the decision of the West Virginia Supreme Court in response to our certified questions in this case unquestionably controlling under the Rules of Decision stature. I, therefore, believe that we are required to affirm the district court's judgement with respect to both the award for loss of enjoyment of life and the loss of future earning capacity. Nor am I persuaded by the majority's view that these damages are in any way punitive and, consequently, prohibited under 28 U.S.C. §2674 of the FTCA, which permits only compensatory damages.

Addressing first the issue of Flannery's entitlement to damages for loss of life, I note that the majority's view of "punitive" prevents Flannery from recovering a component of damages to which he is clearly and unequivocally entitled under West Virginia law. The majority has thus succeeded in creating two conflicting standards for damages awards in West Virginia. In the future, a victim, such as Flannery, who is unjured by a private party, will be entitled to recover damages for loss of enjoyment of life, while that same person, if injured at the hands of the government will receive nothing. This, I submit, is in direct conflict with the clear meaning and intent of the provisions of 28 U.S.C. §2674 and 1346(b), which state that the

government shall be liable *in the same manner and to same extent* as a private party and in accordance with the laws of the place where the negligence occurred.

The majority premises its holding that an award to Flannery for loss of enjoyment of life is punitive on the ground that it is of no direct benefit to him. At least one federal appeals court has refused to follow the view that any award of damages over and above a plaintiff's actual loss is "punitive." In *Kalavity v. United States*, 584 F. 2d 809 (6th Cir. 1978), the Sixth Circuit held that under Ohio law an award of damages in a wrongful death action in favor of decedent's spouse could not be reduced on the ground that the spouse had remarried and received support form her new husband. The court rejected as *"farfetched"* the government's contention that this award did not compensate the plaintiff for any direct or actually-suffered loss. The Court in *"Kalavity"* recognized that "(d)amages are 'punitive' when awarded separately for the sole purpose of punishing a tortfeasor who inflicted injuries 'maliciously or wantonly, and with circumstances of contumely or indignity.' *Milwarkee R. R. v. Arms*, 91 U.S. 489, 493, 23 L.Ed. 374 (1874)." *Id.* at 811, n.l. The Court then went on to note that:

> the purpose of ordinary tort damages, as distinguished from "punitive" damages, is both to compensate and to deter. Tort law mixes these two purposes, compensation and deterrence, when it awards ordinary damages. Tort law may award as customary damages something more than simply out-of-pocket loss, something for deterrence, without spilling over into "punitive" damages awarded solely for the purpose of punishment. . . In excluding "punitive" damages from the coverage of the Tort Claims Act, we believe that Congress simply prohibited use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional

> tort law principles which mix theories of compensation and deterrence together. (Footnote omitted) *Id.* at 811.

I completely agree with this common-sense approach to the meaning of "punitive" under the FTCA and would, accordingly, find the damages awarded to Flannery for loss of enjoyment of life entirely outside the scope of the FTCA's prohibition of punitive damages.

Similarly, I see nothing which would require the district court to deduct an amount for federal income taxes from Flannery's award for lost future earnings. The majority recognizes that even those cases which have held that such a deduction is required were cases in which the decedents in wrongful death actions were high wage earners with annual incomes in excess of $30,000.00. Flannery, whose future wages were calculated on the basis of a $17,481 per year income in 1978, hardly falls in that category. Nor do I subscribe to the majority's implicit holding that this issue is governed by any principle of federal common law applicable to admiralty, worker's compensation, or Federal Employers Liability Act cases. As stated previously, I view the issue of damages entirely as a matter of state law. In West Virginia a deduction for federal income taxes from an award of lost future earnings "need not be made." "Flannery v. United States, W.Va. ," 297 S.E.2d at 441.[1]

Finally, I am unpersuaded by the majority's belief that the award for lost future earnings duplicates in part the award of future medical expenses. In FTCA cases, which are tried without a jury, factual determinations, including

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[1] The 10% deduction suggested by the government and adopted by the majority is arbitrary and without evidence to support it. I also find the majority's approach on the issues of taxes inconsistent and illogical. On the one hand, the majority insists on a deduction for future taxes, but refuses any upward adjustment for income taxes payable by Flannery on post-judgement income for invested funds. The basis for the latter view is the majority's purely speculative theory that all of the income could be invested in tax-exempt securities.

damages, are governed by the clearly erroneous standard of review. *"United States v. Pendergrast"*, 241 F2d 687, 689 (4th Cir. 1957); Fed. R. Civ. P. 52(a). In such cases, we will judge a trial court's finding as to damages to be clearly erroneous only if, after reviewing the entire evidence, we are "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Ferrero v. United States*, 603 F.2d 510, 521 (5th Cir. 1979). The government in this case has not even argued that there has been any duplication in the two components of the damages award which comprise loss of future earnings and future medical expenses. Under West Virginia law, Flannery, as a personal injury plaintiff, is entitled to damages both for his lost earning capacity and for his future medical expenses. On the record before us, I am unable to conclude that the amounts awarded by the district court for these components of Flannery's damages are clearly erroneous.

For the foregoing reasons, I would affirm the district court's judgment.

APPENDIX B

No. CC928

William Flannery, Committee, ETC.

V.

United States of America

Certified Question — Answered and Dismissed
October 28, 1982

Miller, Chief Justice

1. "The permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages." Syllabus Point 9, *Jordan v. Bero*, W.Va., 210 S.E. 2d 618 (1974).

2. "Future damages are those sums awarded to an injured party for, among other things: (1) Residuals or future effects of an injury which have reduced the capability of an individual to function as a whole man; (2) future pain and suffering; (3) loss or impairment of earning capacity; and (4) future medical expenses." Syllabus Point 10, *Jordan v. Bero*, W.Va., 210 S.E. 2d 618 (1974).

3. A plaintiff in a personal injury action who has been rendered permanently semi-comatose is entitled to recover for the impairment of his capacity to enjoy life as a measure of the permanency of his injuries even though he may not be able to sense his loss of enjoyment of life.

4. In computing the loss of future earning capacity a deduction need not be made for federal income taxes.

Miller, Chief Justice:

In this case from the United States Fourth Circuit Court of Appeals we are asked to determine two certified questions. The first is whether under our State damage law a plaintiff in a personal injury action who has been rendered permanently semi-comatose is entitled to recover for the impairment of his capacity to enjoy life. The second question is whether the trial court, when sitting as the finder of facts in a personal injury action, can deduct from the plaintiff's award for lost earning capacity an amount equal to the federal income taxes which would have been levied upon such income had it actually earned.[1] We answer the first question in the affirmative and the second in the negative.

This case was initially tried without a jury before the Honorable Charles H. Haden, II, Judge of the United States District Court for the Southern District of West Virginia, who made this summary of the plaintiff's condition in his memorandum opinion and order dated January 22, 1980:

> "Flannery was approximately 22 years of age at the time of the accident. He was hospitalized in Cabell-Huntington Hospital from October 28, 1974, through April 12, 1975, and in Appalachian Regional Hospital from that date through April 22, 1975. Subsequent to his hospitalization he has remained in a semi-comatose condition that is not likely to improve. Flannery has a projected life expectancy of thirty years (as measured from 1978), provided he continues to receive good nursing care. Testimony was that he is less likely to live out his full life than a normal healthy person because of his reduced

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[1] We have slightly paraphrased the text of the certified questions as they are contained in *Flannery v. United States*, 649 F 2d 270 (4th Cir. 1981). The certification is made persuant to W.Va. Code, 51-1A-3. See *Abrams v. West Virginia Racing Commission*, W.Va., 263 S.E. 2d 103 (1980); *Morningstar v. Black & Decker Mfg. Co., Inc.* W.Va., 253 S.E. 2d 666 (1979).

> resistance to various diseases and medical conditions, such as pneumonia and urinary tract infections. It is unlikely that Flannery will need sophisticated medical treatment, rather he will require constant nursing and custodial care combined with occasional medical oversight. Flannery's parents are capable of providing custodial nursing care and have chosen to provide the care that their son needs in their home. They have provided such care since April, 1975, and intend to do so as long as they are able."

Judge Haden awarded the following elements of damages in his memorandum opinion and order: For hospital, medical and nursing expenses incurred prior to the trial, $48,174.80; for future nursing expenses based on a thirty-year life expectancy, $316,984.00; for impairment of earning capacity, including both wages and fringe benefits, $535,855.00; and, for loss of ability to enjoy life, $1,300,000.00, thus, making a total damage award of $2,201,013.80. The court did not award any amount for pain and suffering,[2] nor did it make any award for permanent disability.

[2] The court's remarks on this point are contained in its memorandum and order of January 22, 1980. p.9:

> "It is totally speculative whether or not Mr. Flannery can in fact experience any pain or suffering, or pleasure, of anything whatsoever. Conversely, it is clear to this Court that the Plaintiff has been deprived, wholly of the capacity to enjoy life. The rule in *Nees v. Julian Goldman Stores, Inc.*, (109 W.Va. 329 154 S.E. 769 (1930) stated in the disjunctive and allowing recovery for pain and suffering or loss of the capacity to enjoy life, is tailored to provide for an unfortunate case such as this."

The court further stated in note5:

> "The plaintiff is not sentient and thus, under West Virginia law, pain and suffering are not capable of proof. Under *Nees v. Julian Goldman Stores, Inc.*, however, this very fact establishes Plaintiff's right to recover for his non-sentient condition, for his loss of the ability to enjoy life."

I.

The law of damages for personal injuries in this State, as is probably true elsewhere, has evolved from individual cases without a great deal of theoretical cohesion. It basically reflects the rather obvious fact that injuries to the person both physical and mental can occur in an almost infinite variety of patterns.

The basic goal in awarding damages is to fairly and adequately compensate the plaintiff for the injuries and losses sustained. In general we have recognized that compensatory damages for personal injuries are composed of two broad categories. First there are those damages which are termed "liquidated" or "pecuniary" in the sense that they represent some form of expense or economic loss that can be rendered reasonably certain monetarily by a mathematical figure or calculation. These include medical, hospital, nursing, dental, drug and all other similar expenses, both present and future that are incurred in treating, curing and alleviating the plaintiff's physical and mental injuries. Also included in this category are lost wages and lost earning capacity.

The second category consists of intangible damages since they are "unliquidated" in the sense that there is no precise monetary calculation that can be used to determine the amount of the loss. The most obvious of these is pain and suffering. Another element of unliquidated damages arises from the plaintiff's permanent injuries. The term *"permanent injury"* is used as a threshold condition that must ordinarily be shown in order to recover any future damages[3] surrounding a personal injury as we said in Syllabus Point 9 of *Jordan v. Bero*, W.Va. 210 S.E. 2d 618 (1974):

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[3] The two broad categories of personal injury damages, liquidated and unliquidated, can also be subdivided as to those damages which have presently accrued at the time of the trial and as to those which will necessarily be incurred in the future.

> "The permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages."[4]

Once a permanent injury is established, then the following elements of future damages can be considered as outlined in Syllabus Point 10 of *Jordan, supra:*

> "Future damages are those sums awarded to an injured party for, among other things: (1) Residuals or future effects of an injury which have reduced the capability of an individual to function as whole man: (2) future pain and suffering; (3) loss of impairment of earning capacity; and (4) future medical expenses."

It is apparent from *Jordan* that the "(r)esiduals or those future effects of any injury which have reduced the capability of an individual to function as a whole man" is a more accurate and precise manner of stating what our earlier cases and those form other jurisdictions have termed damages recoverable for the permanent effects of the injury.

> "Generally, recovery may be had, in personal injury actions, for permanent injuries or permanent impairment of health - that is, for the loss resulting from complete or partial disability in health, mind, or person thereby occasioned ... The destruction or impairment of any physical function is a proper element of damages, and so is deprivation of mental power as a result of physical injury, as where

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[4] In the text of *Jordan, supra* at 634, these cases were cited for this proposition:*Lawrence v. Nelson, 145 W.V.a 134, 113 .S.E. 2d 241 (1960); Shreve v. Faris,* 144 W.Va. 819, 11 S.E. 2d 169 (1959); *Bailey v. DeBoyd,* 135 W.Va. 730, 65 S.E. 2d 82 (1951); *French v. Sinkford,* 132 W.Va. 66, 54 S.E. 2d 38 (1948).

> the injury causes a permanent mental defect or disease." 22 Am. Jur. 2d *Damages* §117 (1965). (Footnotes omitted)

See *Lawrence v. Nelson*, 145 W.Va. 134, 113 S.E. 2d 241 (1960); *Bailey v. DeBoyd*, 135, W.Va. 730, 65 S.E. 2d 82 (1951); *Miller v. Gas Co.*, 88 W.Va. 82, 106 S.E. 419 (1921).

What *Jordan* makes clear is that once a permanent injury has been established that in addition to future pecuniary expenses or liquidated damages and losses such as medical, hospital and kindred expenses and loss of future wages and earning capacity, the plaintiff is entitled to additional damages for future pain and suffering and for the permanent effect of the injury itself on *"the capability of an individual to function as a whole man."* W.Va. at , 210 S.E. 2d at 634.

We believe that the loss of enjoyment of life is encompassed within and is an element of the permanency of the plaintiff's injury. To state the matter in a slightly different manner, the degree of a permanent injury is measured by ascertaining how the injury has deprived the plaintiff of his customery activities as a whole person. The loss of customary activities constitutes the loss of enjoyment of life.

While the certified question speaks of the loss of capacity to enjoy life by a semi-comatose plaitiff who is unable to sense his loss, this question as argued to us contains two parts. First, whether we recognize the loss of enjoyment of life as a seperate element of damages. Second, whether as a incident to such a damage right it must be shown that the plaintiff is conscious of the fact that he has lost any enjoyment of life.

The Court of Appeals, in its decision to certify the question, correctly recognized that our cases in this area were not dispositive. *Flannery v. United States*, 649 F 2d 270 (4th Cir. 1981). In *Nees v. Julian Goldman Stores, Inc.*, 109

W.Va. 329, 154 S.E. 679 (1930), and *Worth v. Jackson County Court*, 71 W.Va. 184, 76 S.E. 420 (1912), reference was made to the impairment of capacity to enjoy life as part of the recoverable damages for personal injuries but there was no discussion of how the impairment of the capacity to enjoy life fitted into the overall damage picture.[5]

There are cases where courts have determined that the loss of enjoyment of life in a non-comatose situation is an element of recoverable damage. In these cases the issue is whether the jury can be instructed to consider as a part of the elements of damages the plaintiff's loss of enjoyment of life or whether such factor is already embraced in an existing category such as pain suffering. In *Mariner v. Masden*, 610 P.2d 6 (Wyo. 1980), the court with no detailed analysis concluded:

> "Since loss of enjoyment of life is compensable, the fact finder — in a case in which loss of enjoyment of life is proved — may either make a separate award for loss of enjoyment of life or take into consideration in arriving at the total general damages." (Footnote omitted)

In arriving at this conclusion, the Wyoming court in *Mariner v. Marsden, supra* at 12, relied primarily on *Swiler v Baker's Super Market, Inc.*, 203 Neb. 183, 187, 277 N.W. 2d 697, 700 (1979),[6] where the court in discussing the propriety of a statement in a damage instruction informing the jury it could take into consideration the loss of enjoyment of life experienced by the plaintiff stated:

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[5] The Court of Appeals in *Flannery v. United States, supra*, also noted that similar statements about loss of enjoyment of life could be found in other West Virginia cases. E.g., *Larzo v. Swift & Co.*, 129 W.V.a 436,40 S.E. 2d 811 (1946); *Gibbard v. Evans*, 87 W.Va. 650, 106 S.E. 37 (1921); *Colebank v. Standard Garage Co.*, 75 W.Va. 389, 85 S.E. 1051 (1915).

[6] *Swiler v. Baker's Super Market, Inc., supra*, cited *Powell v. Hegner*, 239 So 2d 599 (Fal. App. 1970); *Pierce v. New York Central Railroad Company*, 409 F. 2d 1392 (6th Cir. 1969); *Hildyard v. Western Fastners, Inc.*, 33 Colo. App 369, 522 P. 2d 596 (1974), and referenced the cases cited in Annot., 15 A.L.R. 3d 514 (1967). cont. 22a

"'The argument is that this part of the instruction represents a duplication of the elements of permanent disability and of pain and suffering, and thus the jury was permitted to award double damages for the same loss. There was evidence introduced to support the plaintiff's diminished capacity to enjoy life with respect to activities formerly enjoyed, deprivations of pleasure, and inconvenience.

"'... A majority of courts, however, have approved inclusion of loss of enjoyment of life as a consideration that may be instructed upon in a proper case and be considered by the jury....

"'Loss of enjoyment of life may, in a particular case flow from a disability and be simply a part thereof, and where the evidence supports it, may be argued to the jury.'" (Emphasis omitted)

The cases that recognize the loss of enjoyment of life do not analyze its relationship to the permanency of the plaintiff's injury in any detail. Yet, it is obvious that the loss of enjoyment of life is directly linked to the permanency of the plaintiff's injury and a jury in evaluating the nature and degree of the permanency of the plaintiff's injury will ascertain how such injury has affected his ability to perform and enjoy the ordinary functions of life. This loss of capacity to enjoy life is not a function of pain and suffering in the traditional sense of those words since one can lose his eyesight or a limb and be without physical pain. Yet, it is obvious that such injuries will impair the person's capacity to enjoy life.

——— cont. from 21a

We note that commentators have not consistently devised or applied a uniform analysis for loss of enjoyment of life damages. Comment, *Loss of Enjoyment of Life As a Seperate Element of Damages*, 12 Pac. L.J. 965 (1981); Comment, *Loss of Enjoyment of Life — Should it be a Compensable Element of Personal Injury Damages?*, 11 Wake Forest L. Rev, 459 (1975); Comment, *Nonpecuniary Damages for Comatose Tort Victims*, 61 George L.J. 1547 (1973).

Where the element of the loss of enjoyment of life is fitted into the damage picture may be somewhat semantical,[7] but we believe it logically should be a part of evaluating the permanency of the plaintiff's injury. We believe that our definition of a permanent injury which includes "those future effects of an injury which reduced the capability of an individual to function as a whole man," as set forth in *Jordan, supra* at 643, is the appropriate area for considering the element of the loss of enjoyment of life.

We are not unmindful of the defendant's argrument that the law does not permit double recovery for the same damages. We recently spoke to this in Syllabus Point 7 of *Harless v. First National Bank in Fairmont*, W.Va. , 289 S.E. 2d 692 (1982):

> "It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories."

Here, however, we have an *element*, a component, of damages that may be considered by a jury in determing the amount of its award. Just as a jury may consider the nature, effect and severity of pain when fixing damages for personal injury, or may consider mental anguish caused by scars and disfigurement, it may consider loss of enjoyment of life. *Sargent v. Malcomb*, 150 W.Va. 393, 146 S.E. 2d 561 (1966); *Robinson v. Virginia-Pocahontas Coal Co.*, 78 W.Va. 94, 88 S.E. 620 (1916).

In the present case the trial judge did not award separate amounts for both the permanency of the

[7] At least one court has fitted the loss of enjoyment of life as an element of mental suffering. E.g., *Judd v. Rowley's Cherry Hill Orchards, Inc.* 611 P.2d 1216, 1221 (Utah 1980) ("Included in mental pain and seffering is the diminished enjoyment of life as well as the humiliation and embarrassment resulting form permanent scars and disabilty.")

plaintiff's injuries and the losss of enjoyment of life. If this had been done, there would have been an impermissible duplication of damages. It is obvious from the evidence that the plaintiff was totally and permantly disabled and had by virture of this fact lost all of life's enjoyment. In this particular case, the $1,300,000 award could be correctly characterized as the amount of the plaintiff's permanent disability resulting from his loss of capacity to enjoy life or as *Jordon* expresses it as his reduced capability *"to function as a whole man."*[8]

Having determined that the loss of enjoyment of life is an element of a permanent injury award, we consider whether it can be recovered by a semi-comatose plaintiff who because of the severity of his injuries is not aware of his loss of life's enjoyment. We have earlier pointed out *Jordan* evolved the test that once the medical evidence demonstrates that a plaintiff has a permanent injury then under our law he is permitted to recover future damages such as pain and suffering and medical expenses, but in addition damages for the future effects of the injury which has reduced his capability *"to function as a whole man."* Thus the permanency of the plaintiff's injury relates to the *"whole man"* and is cast in terms of an objective standard.

If we put aside the label *"loss of enjoyment of life"* and look to its underlying function which is to measure the degree of permanent disability to the whole person arising from the injuries inflicted, some of the subjective content of the analysis disappears. Consequently, the plaintiff's lack of knowledge of the extent of his permanent injury is not a factor under *Jordan's "whole man'* test.

We do not believe that the plaintiff's subjective knowledge of the extent of his loss should be controlling. There are obviously many situations, particularly injuries to

[8] In the present case the trial court was sitting as the factfinder and decided to assign seperate amounts for the different catergories of damages. Ordinarily, a jury will return an unitary sum for damgaes in a personal injury action for all compensatory damages and is not required to itemize the individual elements of damages since we look at the entire verdict to determine if it is excessive.

infants or young children where their experience of life is so minimal that their ability to comprehend the extent of their permanent disability is negligible, and yet these young plaintiff's have not been denied recovery for permanent injuries. A classic illustration is the infant who has been blinded by excessive amounts of oxygen in the incubator. E.g., *Penetroute v. United States*, 604 F 2d 1248 (9th Cir. 1979); *Greenburg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W. 2d 902 (1978); *Air Shields, Inc. v. Spears*, 590 S.W. 2d 574 (Tex. Civ. App. 1979); *Shockley v. Prier*, 66 Wis. 2d 394, 225 N.W. 2d 495 (1975). The same argument, as made in this case, could be advanced in regard to the child's blindness that since he never had any vision or at best only for a limited time span, he would be unaware of what full vision meant and consequently his permanency as reflected by his subjective knowledge of his loss of enjoyment of visual life would be minimal.[9]

The argument that the plaintiff must have an awareness of the extent of his loss as defense to a permanent injury bears some analogy to the argument that the defendant should not be liable for injuries made more severe because of the plaintiff's pre-existing ill health or disability. Thus, the one-eyed person who is blinded in his good eye should only be found half-blind. This principle has been uniformly rejected in the personal injury damage law. Cf. *Perkins v. Monongahela Valley Traction Co.*, 81 W.Va. 781, 95 S.E. 797 (1918); 22 Am. Jur. 2d *Damages* §122 (1965). We accordingly hold that a plaintiff in a personal injury action who has been rendered permanently semi-comatose is entitled to recover for the impairment of his capacity to enjoy life as a measure of the permanency of his injuries even though he may not be able to sense his loss of enjoyment of life.

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[9] All counsel draw our attention to several English cases that have dealt with the loss of enjoyment of life to a comatose plaintiff and have upheld such awards. E.g., *Wise v. Kay*, *1 Q.B. 638 (1962)*; *Sherman v. Folland*, 2 K.B. 43 (1950); *Fair v. London and Northwestern Railway Co.*, 21 Law Times New Series 326 (1869). Their reasoning is not particularly helpful because of the differences in the English and our damage law.

II.

With regard to the question of whether a trial court, when sitting as a finder of facts in a personal injury action, can deduct from the plaintiff's award for lost earning capacity an amount equal to the federal income taxes which would have been levied on such income had it actually been earned, we decline to make a distinction between a trial to the court and a jury trial. The main thrust of the defendant's argument for such a distinction is that a trial court is capable of making the appropriate tax calculation whereas a jury might not be. This parallels an analysis that is frequently used by courts who refuse income tax consideration on lost earning capacity because it would be too confusing for the jury to make such a calculation. Annot., 63 A.L.R. 2d 1393 (1959).

A more basic problem, however, is the obvious dichotomy this would engender in our damage law if we permitted one damage rule if the case were tried to the judge and another damage rule if it were tried to the jury. Such a result besides being illogical would invariably lead the plaintiff's attorney who had any substantial claim of lost earning capacity to demand a jury trial.

Both parties cite *Crum v. Ward*, 146 W.Va. 421, 122 S.E. 2d 18 (1961), where we held in Syllabus Point 12:

> "In an action for damages for personal injuries, it is not reversible error for the court to refuse to read to the jury an instruction to the effect that, in the event of a recovery by plaintiff, no sum should be allowed in respect to any Federal income tax".

The parties as well as the Court of Appeals recognize that *Crum* is not controlling on the issue presented here since it involved a general instruction to the jury that a plaintiff's damage award is not subject to income taxes. The plaintiff urges that *Crum's* holding represents the majority view as

to instructions and that a majority of courts also hold that income tax impact need not be taken into account in calculating impairment of future earning capacity. Annot., 63 A.L.R. 2d 1393 (1959).

The defendant cites *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490, 62 L.Ed. 2d 689, 100 S.Ct. 755 (1980), *reh. denied*, 445 U.S. 972, 64 L.Ed. 2d 250, 100 S.Ct. 1667, where the Supreme Court ruled in a Federal Employers Liability Act (FELA) case, that the lower court erred in not permitting evidence of the income tax liability on future earnings. *Accord Cazad v. Chesapeake & Ohio Railroad Co.*, 622 F 2d 72 (4th Cir. 1980). The First Circuit Court of Appeals has recognized that *Norfolk & Western Railway Co.* is limited to FELA cases and had this to say about the opinion: "Morever our research indicates that the *'Norfolk and Western'* case stands against a mountain of contrary state authority (circa 28 states do not consider tax impact; 6 do)." *Estate of Spinosa*, 621 F. 2d 1154, 1158-59 (1st Cor. 1980).

Whatever the initial Congressional intent was in first enacting Section 104 of the Internal Revenue Code which exempts income tax on personal injury awards, it is clear that under our progressive income tax rate system if there were no exemptions, the entire amount of an injured plaintiff's future loss of earnings would be subject to being taxed in the year the damage award was received.[10] The unfairness of this result is apparent on future loss of earnings which traditionally are calculated on the plaintiff's

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[10] We recognize that under the Internal Revenue Code, Sections 1301-1305, such earnings would be entitled to the income averaging provisions. A comprehensive review of the tax considerations is contained in Yorio, *The Taxation of Damages: Tax and Non-Tax Policy Considerations*, 62 Cornell L. Rev. 701 (1977).

future work life expectancy and then discounted to present day value.[11]

As previously noted, a majority of courts have concluded that the plaintiff's future loss of earnings should not be subject to a deduction for the impact of federal income taxes. A number of reasons are advanced, some are perhaps more persuasive than others, as summarized in Annot., 63 A.L.R.2d 1393, 1396 (1959), which we quoted in *Crum v. Ward,* 146 W.Va. at 443-44, 122 S.E. at 31:

> "'Courts so ruling have rather generally considered that income tax liability or saving is a matter not pertinent to the damages isssue, being a matter between the plaintiff and the taxing authority, of no legal concern to the defendant; that the amount of income tax which might become due on one's prospective earnings in future years is too conjectural to be considered in fixing damages; or that to introduce the income tax matter into a lawsuit for damages would be unduly complicating and confusing * * *'."

The main reason advanced by most courts in refusing to take income tax consequences into consideration in fixing damages for impairment of earning capacity is that the amount of one's future income tax liability is too conjectural or speculative. *Stokes v. United States,* 144 F. 2d

[11] This process is described in Peck & Hopkins, *Economics and Impaired Earning Capacity in Personal Injury Cases,* 44 Wash. L. Rev. 351 353 (1969):

> "The actuarial approach establishes the present value of destroyed earning capacity on the basis of calculations which assume that income lost during a base year would have been received over a period of years equal to the life (or work-life) expectancy of the person injured or deceased. This sum is then discounted to yield a capitalized value which would pay out (from both principal and interest) a fixed income over the specified number of years."

See also note 6, *Tenore v. NuCar Carriers, Inc.,* 67 N.J. 466, 341 A.2d 613 (1975).

> "Allowing this subject matter to be considered would require the admission of expert opinion evidence as to what future income tax rates and deducations are expected as well as opinion evidence on what would be applicable to the subject wage earner during various phases of the jury's future loss calculations. Of necessity, this evidence would have to be accompanied by an instruction from the court as to the application of these rates to such untaxable compensatory elements (and, in some cases, such taxable punitive damage elements) as may be involved in the verdict. To compound the complexity and the jury's difficulty in reducing the proof to a monetary award, the tax effect of contingent attorney's fees and the taxability of the interest earnings under the annuity principle used to calculate the reduced present value of future wages would have to be analyzed."

We also recognize the purpose of reducing the loss of earnings to present day value is to arrive at a sum of money that when invested by the plaintiff will over the years provide by expending both principal and income an annual amount to supplant his loss of earnings. To the extent that this sum yields income or interest it is subject to federal income tax and and as a result at least a part of plaintiff's loss of future earning capacity is subject to the federal income tax.

Consequently, we adopt the majority view and hold that in computing the loss of future earning capacity a deduction need not be made for federal income taxes.

The certified questions having been answered, this case is dismissed from the docket.[12]

Answered and Dismissed

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[12] The Court wishes to extend its appreciation to the firms of Jackson, Kelly, Holt & Farrell and Preiser & Wilson, who were requested to file *Amicus curiea* brief.

APPENDIX C

No. 80-1563

William Flannery, Committee
for Michael George Flannery,
Appellee,

versus

United States of America
Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Charles H. Haden, II, Chief District Judge.

Argued April 8, 1981 — Decided May 21, 1981

Before WINTER, Chief Judge; HALL, Circuit Judge; and HAYNSWORTH, Senior Circuit Judge.

Marc Johnston, Civil Division, Dept. of Justice (Alice Daniel, Assistant Attorney General; Robert B. King, United States Attorney; Anthony J. Steinmeyer, Civil Division, Dept. of Justice on brief) for Appellant; Ray L. Hampton, II (Lafe C. Chafin, Barrett, Chafin, Lowry & Hampton on brief) for Appellee.

HALL, Circuit Judge:

The United States appeals from a judgment entered by the district court in favor of William Flannery, Committee for Michael Flannery, under the Federal Tort Clains Act (Act), 28 U.S.C. §2671, *"et seq"*. *Because we conclude that the dispositive issues of this case present questions of West Virginia state law for which there appears no controlling precedent, we certify the questions set forth in Part IV of this opinion to the West Virginia Supreme Court of Appeals, pursuant to that state's certification statute, W. Va. Code Ann. §51-1A-1, "et seq."*, (1981 Replacement Vol.).

On October 27, 1974, Michael Flannery's vehicle was struck by another automobile at an intersection in Huntington, West Virginia. The automobile was owned by the United States and was being operated by a government employee in the course of his employment. As a result of his injuries, Flannery was left permanently semi-comatose.

William Flannery, as committee for Michael Flannery, filed a personal injury claim against the government pursuant to the Act. After the administrative remedies of the Act were exhausted, a complaint was filed in federal district court.

The case was tried to the court without a jury, and West Virginia law was applied to determine the government's liability in accordance with Section 2674 of the Act. After separate trials on liability and damages, the court found the government employee negligent and entered judgment in Flannery's favor for $2,300,000.00. This award included, in part, $1,300,000.00 for the impairment of Flannery's capacity to enjoy life, and $535,855 for his lost earning capacity.

On appeal, the government does not challenge the district court's finding of liability. Rather, the government argues (1) that the damage award for impaired capacity to enjoy life was not sanctioned by West Virginia law; (2) that

the award for lost earning capacity did not reflect the impact of federal income taxes; and (3) that both awards were excessive.

II.

The court found that due to his semi-comatose condition, Flannery could not experience pain, suffering, pleasure or any other sensation. However, the court determined that under West Virginia law, impaired capacity to enjoy life was separable from pain and suffering, and was recoverable despite Flannery's inability to sense his impairment. The court concluded that Flannery had been totally deprived of his capacity to enjoy life and, therefore, wa entitled to damages.

The government contends that under West Virginia law, impaired capacity to enjoy life is an element of pain and suffering and, and like pain and suffering, is necessarily dependent upon the plaintiff's ability to snse and experience the injury. Because the government argues that he is not entitled to recover. Flannery's representative counters that Flannery's impairment is a clear and undeniable fact. The representative characterizes the government's argument as an attempt to take advantage of the severe injuries its employee inflicted.

Both parties cite the decisions of the West Virginia Supreme Court of Appeals in *Nees v. Julian Goldman Stores, Inc.*, 109 W.VA. 329, 154 S.E. 769 (1930), and "Warth v. Jackson County Court", 71 W.VA. 184, 76 S.E. 420 (1912). Neither of these cases is dispositive. In "Nees" the court discussed the difficulties of measuring certain types of compensatory damages. During this discussion, the court posed the question:

> "Who shall measure physical pain, mental anguish, "or" impairment of capacity to enjoy life?"

109 W.VA. at 339, 154 S.E. at 774. (Emphasis added)

Because the court listed these injuries in the disjunctive, the district court concluded that impaired capacity to enjoy life was independently recoverable. However, later in the same opinion, the *Nees* court stated:

> "The elements of damages for which (the plaintiff) could recover were physical pain, mental anguish, *and* impairment of her capacity to enjoy life."

109 W.Va. 340, 154 S.E. at 774 (Emphasis added)

In "Warth", the court discussed the propriety of certain instructions tendered by the defendant. In regard to a proposed instruction on damages, the court stated:

> "No. 7 was properly refused because it is a binding instruction and leaves out of account, as elements of damage, physical pain, mentl anguish, "and" impairment of capacity to enjoy life."

71 W.VA. at 191, 76 S.E. at 423. [1] (Emphasis added)

These decisions indicate that West Virginia recognizes impaired capacity to enjoy life as an injury, but they offer no guidance for determining whether a semi-comatose plaintiff is entitled to recover for such an injury. This question presents difficult legal and policy considerations which we believe should be addressed first by the highest court of the state.

III.

The government requested the district court to measure Flannery's lost earning capacity by his potential

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[1]Similar statements are made in "Larzo v. Swift & Co.", 129 W.VA. 436, 40 S.E.2d 811 (1946); "Gibbard v. Evans",87 W.VA. 650, 106 S.E. 37 (1921); and "Colebank v. Standard Garage Co.", 75 W.VA. 389, 84 S.E. 1051 (1915).

net income after federal income taxes. The government argued that the wages Flannery would have earned in the future would have been subject to federal income taxes and, therefore, the proper measure of this loss was his net wages. The court permitted the introduction of evidence on the issue, but rejected the government's position on the basis of the ruling in "Crum v. Ward", 146 W.Va. 421, 122 S.E.2d 18 (1961).

"Crum" involved the jury trial of a personal injury action. The defendant requested the trial court to instruct the jury that, in the event they returned a verdict for the plaintiff, they could not "add any sum to what you would otherwise find on account of Federal income taxes." 146 W.Va. at 442, 122 S.E.2d at 30. The defendant requested further instruction that as a "matter of law any amount you award the plaintiff by your verdict is not income to the plaintiff within the meaning of Federal tax law." "Id". The trial court refused to give the instruction, and the Supreme Court of Appeals affirmed that ruling on the ground that such instructions would involve too many variables and would only confuse the jury. 146 W.Va. 444, 122 W.E.2d at 31.

The government argues that "Crum" applies only to jury trials because the court, sitting as fact-finder, would not be confused by the tax issue. Although the authorities cited in "Crum" voice concerns which extend beyond simple jury confusion, we agree that "Crum" by its express terms is limited to jury trials. We feel this issue is a proper subject for certification.

IV.

Accordingly, we certify the following questions to the West Virginia Supreme Court of Appeals:

1. Under West Virginia law, is a plaintiff in a personal injury action, who has been rendered permanently semi-comatose by his injuries and is therefore unable to sense

his injuries, entitled to recover for the impairment of his capacity to enjoy life?

2. Under West Virginia law, must the trial court, when sitting as the finder of fact in a personal injury action, deduct from the plaintiff's award for lost earning capacity an amount equal to the federal income taxes which could have been levied upon such income had it actually been earned?

This opinion shall constitute the statement of relevant facts required by the West Virginia certification precedure, W.Va. Code Ann. §51-1A-3 (1981 Replacement Vol.).

To afford counsel the opportunity to comment upon both our statement of the relevant facts and the proposed questions prior to certification order will be stayed for fourteen days from the filing of this opinion. Any comments or suggestions filed by counsel within this time period will be taken under advisement and the facts and the questions will be modified as we deem proper. Our formal order of certification will provide that all fees and costs in the West Virginia Supreme Court of Appeals shall be equally divided among the parties.

"AN ORDER WILL ISSUE"

APPENDIX D

In the United States District Court
for the Southern District of West Virginia
Huntington

William Flannery, Commitee
for Michael George Flannery,
Plaintiff,

vs. Civil Action #76-0306 H

United States of America
Defendant.

Entered January 22, 1980

Memorandum Opinion and Order

Plaintiff instituted this action pursuant to the Federal Tort Claims Act, 28 U.S.C. §346, 2671-2680, to recover for personal injuries suffered by Michael George Flannery as the result of an automobile accident involving another automobile driven by William F. Willien, an employee of the United States Coast Guard. After a two day trial, this Court ruled that the United States, by and through its agent Willien, negligently caused and was solely responsible for the injuries suffered by Flannery. Determination of the extent of damages sustained by Flannery was withheld so that the record could be supplemented with the deposition of Jaldir Lobo, M.D., one of Plaintiff's treating physicians. That deposition is herewith made a part of the record in this action. Both parties have submitted briefs on the issue of damages.

The accident giving rise to this action occurred in Huntington, West Virginia, and thus the substantive law in the State of West Virginia governs the legal determinations to be made. 28 U.S.C. §2674. At issue presently are the value of past and future medical expenses, as well as certain issues concerning the loss of earning capacity.

Flannery was approximately 22 years of age at the time of the accident. He was hospitalized in Cabell-Huntington Hospital from October 28, 1974, through April 12, 1975, and in Appalachian Regional Hospital from that date through April 22, 1975. Subsequent to his hospitalization he has remained in a semi-comatose condition that is not likely to improve. Flannery has a projected life expectancy of thirty years (as measured from 1978), provided he continues to receive good nursing care. Testimony was that he is less likely to live out his full life than a normal healthy person because of his reduced resistance to various diseases and medical conditions, such as pneumonia and urinary tract infections. It is unlikely that Flannery will need sophisticated medical treatment, rather he will require constant nursing and custodial care combined with occasional medical oversight. Flannery's parents are capable of providing custodial nursing care and have chosen to provide such care since April, 1975, and intend to do so as long as they are able.

"Medical Expenses"

The Court heard evidence on two alternative means of providing the care that Flannery needs: in-home care, as calculated at trial by an economist, based upon the projected thirty year life expectancy as of 1978, totals $530,158.00.[1] The value of nursing home care, based upon the same projected life expectancy, totals $316,984.00. Although the Government concedes that in-home care by Flannery's parents may provide some type of emotional satisfaction for the family and "may indeed be superior to

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[1] This figure and the estimate of loss of future earning capacity *intra* represent final and total calculations reduced to present value.

nursing home care in terms of the personal attention given Flannery", the Government nevertheless contends that it should be required to compensate only for the value of nursing home care.

The well established law of West Virginia is that "a plaintiff may recover the cost of reasonable and necessary future medical and hospital services . . . where the evidence shows that it is reasonably certain that such future expenses will be incurred and are proximately related to the negligence of the defendant. See, e.g., *Simmons v. City of Bluefield*, 225 S.E.2d 202 (W.Va. 1975); *Jordan v. Bero*, 210 S.E.2d 618 (W.Va. 1974); *Shreve v. Faris*, 144 W.Va. 819, 111 S.E.2d 169 (1959)." *Ellard v. Harvey*, *W.Va.*, 231 S.E.2d 339 (1976). Additionally, such medical evidence must be demonstrated only to a *reasonable certainty*. *Ellard v. Harvey, supra; Simmons v. City of Bluefield, supra.* The question that the Court must address, therefore, is whether, under this rule, the value of the more expensive in-home care can be said to be reasonable and necessary.

As the Government argues, there is nothing in the record to suggest that nursing home care constitutes a reasonable and necessary future medical expense. It is apparent to all concerned that in-home care probably is superior to nursing home care, at least in this particular case, so long as Flannery's parents are capable of providing such care. Nevertheless, because of the vast difference in the estimated cost of the two types of care, over the projected thirty year period, the Court finds that the higher value of in-home care cannot be said to be necessary when there is a much less expensive alternative available. Accordingly, the Court finds that the reasonable and necessary future medical expenses constitute $316,984.00.

The value of past medical expenses is not in dispute. Hospitalization in Cabell-Huntington Hospital totalled $16,060.80. Hospitalization in Appalachian Regional Hospital totalled $1,030.00. Services provided by Dr. Jaldir Lobo constitute $1,834.00. The total of these figures is

$18,924.80, and all parties agree that these past medical expenses are reasonable and necessary, and the Court so finds.

Mr. Flannery has been cared for by his parents in their home from his release from the hospital in April, 1975, to the present. Under West Virginia law Flannery's parents are entitled to compensation for reasonable and necessary nursing services rendered by them. *Kretzer v. Moses Pontiac Sales, Inc., W.Va.*, 201 S.E.2d 275 (1973). Although the value of in-home care is substantially higher than that of nursing home care, for the reasons previously stated, and based upon the evidence of record, the Court finds that the reasonable value of nursing home expenses is $9,000.00 a year, and that the past medicl expenses shall include an award of $9,000.00 a year commencing April 22, 1975, through the date of this judgment.

"Impairment of Earning Capacity"

West Virginia law recognizes the right of a personal injury plaintiff to be compensated for impairment of earning capacity and loss of future earnings. *E.g., Gault v. Monongahela Power Co., W.Va.*, 223 S.E.2d 421 (1976). The rule followed by a majority of jurisdictions allows a plaintiff to recover for loss of earning capacity based upon the plaintiff's life expectancy as measured before the injury. 22 Am. Jur.2d, "Damages", §92, and cases cited therein. Thus, if the plaintiff's life expectancy is shortened by the injury, he is not limited to a recovery for loss or earning capacity based on that shortened life expectancy. "Id". In accordance with this well settled rule, the Court will base the award for Plaintiff's loss of earning capacity upon projected employment to age 65.

Plaintiff's economist testified at trial that, assuming a retirement age of 65, a reasonable estimate of Flannery's impaired earning capacity would be $535,855.00. This fugure included wages plus "Supplemental income" or fringe benefits, computed at a rate of approximately 35.4% of the value of the wages. Plaintiff's economist offered the

"only" evidence of record concerning Plaintiff's loss of earning capacity. The United States now challenges that figure as excessive for two reasons: (1) no provision is made for deduction of income taxes; and (2) the value of fringe benefits, including social security benefits, is overestimated because no offset is made for social security taxes.

The United States contends that there is no definitive ruling by the West Virginia Supreme Court of Appeals as the whether a deduction for income taxes is appropriate in calculating future loss on earnings. In the case of *Crum v. Ward*, 146 W.Va. 421, 122 S.E.2d 18 (1961), the Court held that, in a personal injury action, it is not reversible error for the trial court to refuse to instruct the jury that, in the event of recovery by the plaintiff, no sum should be allowed in respect of any federal income tax. Syllb. pt. 12, *Id.* The United States contends that *Crum v. Ward* is not dispositive here, arguing that the rule of that case applies only in trials to a jury and rests upon judicial reluctance to inject an issue which, possibly, could confuse a jury. The United States argues that, in the absence of clear West Virginia law on the matter, this Court should follow the better reasoned rule as stated in *Mosley v. United States*, 538 F.2d 555 (4th Cir. 1976), and *Brooks v. United States*, 273 F. Supp. 619 (D. S.C. 1967), and, therefore, make appropriate adjustments for income taxes.

Certainly the rule in *Crum v. Ward* rests in part upon a desire not to confuse juries. Full reading of the opinion, however, and reference to the authorities relied upon therein, suggest that the rule, as adopted in West Virginia, has broader application than the United States contends. Indeed, the basis for the general rule rests upon the reluctance to inject an issue that potentially could confuse a jury, as well as a policy consideration that income tax liability is a matter resting between the Plaintiff and the taxing authority, and that the amount of income tax which might become due on one's prosective earnings in future years is too conjectural. 22 Am. Jur. 2d, "Damages", §88 and cases cited therein. The Court in *Crum v. Ward* recognized these general policy bases of this rule in its

citations to authorities upon which it relied. *Crum v. Ward, supra,* 146 W.Va. at 443-444, 122 S.E.2d at 31. Regardless of the wisdom of the alternative positions, this Court finds that the West Virginia law is established by *Crum v. Ward,* and thus this Court refuses to apply the rule established in *Mosley, supra* and *Brooks, supra.*[2] The Court recognizes that the language in *Crum v. Ward* is not absolutely binding precedent: The holding in that case governs jury instructions in jury trials. Nevertheless, in the absence of any other West Virginia authority to the contrary, the Court finds that the broad policy enunciated in *Crum v. Ward* is applicable here.[3]

The Plaintiff's economist's estimate of a 35.4% rate for future supplemental income, although obviously of a somewhat conjectural nature, was the sole evidence offered at trial on this subject. The Government argues that this rate is excessive because it is "admittedly liberal" and that it comprehends social security benefits but does not allow for a deduction of social security employment taxes. Here again, the Court is persuaded that the broad rule of *Crum v. Ward* would apply so as not to necessitate this Court to reduce any award for loss of earning capacity by amounts constituting estimated social security

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[2] As the Courts in *Mosley and Brooks* recognize, those cases rested upon interpretations of the laws of North Carolina and South Carolina respectively, which unquestionably differ on the particulars as discussed in those cases.

[3] Additionally, the evidence at trial was not properly developed in a manner that would enable this Court to make a finding as to the Plaintiff's potential tax liabilities. The Government urges the Court to give the Plaintiff "the benefit of the doubt for tax purposes by assuming that he could be married with two dependents and further assuming a standard deduction of $3,200.00." *Memorandum of United States With Respect to Damages,* p.7. For this Court to make a finding upon such a conjectural basis would constitute a significantly more speculative ruling than normally is required in this already speculative relm of judicial activity. The Government simply ignored the opportunity to support contentions of this nature at trial with evidence which could have been tested by cross examination.

employment tax payments.[4] Additionally, although the rate for future supplemental income of 35.4% is admittedly liberal, this is not necessarily a basis upon which this Court should refuse to adopt the figure as one constituting reasonable compensation for Flannery's losses. Once again, the Government simply did not offer any evidence of its own on this issue. Accordingly, the Court finds that the estimate of the Plaintiff's economist of loss of future earning capacity is supported by the uncontroverted evidence adduced to a reasonable degree of economic certainty.

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[4] In addressing the issue of recovery for loss of earnings, the Court applied the "collateral source" doctrine to allow recovery for lost wages that the plaintiff had been compensated for by "sick-leave benefits. *Ellard v. Harvey, supra*, 231 S.E. 2d at 344. The Court noted that "an alternative theory of recovery is to directly permit damages for the lost (sic) of sick-leave benefits occasioned by an injury." Id. at 344. This comment, although raised in the context of the collateral source doctrine, suggests the appropriateness under West Virginia law of allowing full recovery for loss of any "fringe benefits".

Loss of Ability to Enjoy Life

The majority of jurisdictions do not consider impairment of the capacity to enjoy life as a proper element of damages in personal injury cases, and do not allow recovery for such. See 22 Am. Jur. 2d, *Damages*, §120. The reason for this rule is that allowance of such damages is deemed too conjetural and speculative and too difficult of measurement. Id. West Virignia, however, holds with the minority position that a plaintiff can recover for impairment of the capacity to enjoy life. *Nees v. Julian Goldman Stores, Inc.*, 109 W.Va. 329, 154 S.E. 769 (1930). In that case the West Virginia Supreme Court of Appeals dealt with both the rule and the underlying reason offered by most courts for not allowing such damages. The Court stated:

> "It would be very difficult, if not quite impossible, to lay down a yardstick, or measure, by which to compensate for pain and suffering, or the impairment of health .... But where the damages do not admit of definite or approximate estimate, there is no legal measure of damages, and the law leaves the amount entirely to the sound discretion of the jury, and the verdict in such case will not be disturbed unless the amount is so large or small as to evince passion, prejudice or some ulterior motive on the part of the jury. Who shall measure physical pain, mental anguish, or impairment of capacity to enjoy life?" *Nees v. Julian Goldman Stores, Inc.*, 109 W.Va. at 339, (154 S.E. at 773-774.) Emphasis added. Citations omitted.

The unequivocal evidence in this case is that Flannery, once a normal, active and healthy young man, has been reduced to a permanent irreversible comatose state. It is totally speculative whether or not Mr. Flannery can in fact experience any pain or suffering, or pleasure, or anything whatsoever. Conversely, it is clear to this Court that the

Plaintiff has been deprived, wholly, of the capacity to enjoy life. The rule in *Nees v. Julian Goldman Stores, Inc., supra* stated in the disjunctive and allowing recovery for pain and suffering or loss of the capacity to enjoy life, is tailored to provide for an unfortunate case such as this. The Court in thar case authorizes a plaintiff such as Flannery the right to recover for the most grievous wrong done to him, notwithstanding the inability of all concerned to put a dollar figure on that loss. This onerous task has fallen to this Court. Accordingly, the Court finds that the Plaintiff is entitled to recover the sum of $1,300,000.00 as compensation for the undisputed total and permanent loss of the capacity to enjoy the experience of life.[5]

[5] The United States argues that the Plaintiff cannot recover on this claim because there was no prayer for this relief on the complaint. Plaintiff did, in the complaint, seek to recover damages for pain and suffering, past and future. The Court finds that this allegation in the complaint encompasses the relief that the Court grants here. Logic and justice dictate this result in this case.The Plaintiff is not sentient and thus, under West Virignia law, pain and suffering are not capable of proof. Under *Nees v. Julian Goldman Stores, Inc.*, however this very fact establishes Plaintiff's right to recover for his non-sentient condition, for his loss of the ability to enjoy life. Moreover, the Court cannot ascertain how the United States can be prejudiced by this interpretation of the Plaintiff's complaint. The Court will however, invite the United States to move for reconsideration of this aspect of the judgement should the United States submit a proffer of proof on the issue, or otherwise demonstrate the prejudice suffered.

As evidenced by the above quote, the Court recognized in *Nees v. Julian Goldman Stores, Inc.*, the extreme difficulty of determining an appropriate amount for compensating loss of the capacity to enjoy life. Thus, this Court's award for that particular loss is admittedly subjective. The Court believes that the figure, however, is fair and reasonable. Moreover, this Court is influenced by the new West Virginia rule governing allegedly excessive awards by the juries, In *Addair v. Majestic Petroleum Co., Inc.*, _____ W.Va. _____, 232 S.E. 2d 821 (1977), the Court held:

> "Courts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, particlity, prejuduce or corruption." Id.

Findings and Conslusions

In accordance with the foregoing, the Court makes the following findings of fact and conclusions of law:

(1) The Plaintiff, Michael George Flannery, has been, presently is and will remain, permanently and totally disabled as a direct and proximate result of the Defent's negligence.

(2) Barring new medical techniques, a miracle, or other events wholly beyond the contemplation of the parties or the expectations of medical science, the Plaintiff, Michael George Flannery, will remain in a semi-comatose state for the remainder of his life.

(3) Based upon the medical evidence, the Plaintiff is not expected to live beyond the year 2008.

(4) Plaintiff will require constant nursing and custodial care for the remainder of his life.

(5) The Plaintiff will require medical care and treatment by physicians as his medical condition dictates, but no special surgery, therapy or treatment appears medically neccessary at this time.

(6) The value of past medical expense that the Court finds to be both reasonable and neccessary, may be itemized as follows:

A. Hospitalization - Cabell-Huntington Hospital
10/28/74 through 4/12/75 $ 16,060.80

B. Hospitalization - Appalachian Regional Hospital
4/12/75 through 4/22/75 1,030.00

C. Services rendered by Jaldir Lobo, M.D. 10/28/74 through 4/12/75 1,834.00

D. Nursing services rendered by Flannery's parents from April, 1975 through July 1978 29,250.00

(7) The value of future medical expenses that the Court finds to be both reasonable and neccessary and reasonably certain to occur, based upon the figure submitted for nursing home care for a thirty year period, equaling $316,984.00.

(8) The Plaintiff's loss as a direct consequence of the impairment of his earning capacity, including both wages and fringe benefits, equalling $535,855.00

(9) An award for the loss of the ability to enjoy life, as a direct consequence of the injuries suffered, equalling $1,300,00.00

(10) The Court finds that the total of the above enumerated damages is the sum which the Plaintiff shall recover as judgement in this action. The sum amounts to $2,201,013.80, plus interest as provided by law and costs in his behalf expended.

In accordance with the foregoing, the Court hereby finds that the Plaintiff, Michael George Flannery, has suffered damages in the total of $2,201,013.80; that the Plaintoff is entitled to recover this sum as compensation for the injuries suffered as a direct result of the negligence of the Defendant, United States, and that the United States shall tender the sum of $2,201,013.80 within 120 days from the date of the entry of this Order or as soon thereafter as provided by law.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Enter: 1/21/80
Charles H. Haden II
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 80-1563

William Flannery, Commitee for
Michael George Flannery,
Appellee,

ORDER

vs.

United States of America,
Apellant.

Upon consideration of the petition for rehearing, and a poll of the court having been made on the suggestion of rehearing *en banc* with less than a majority of the active judges voting for rehearing *en banc*,

IT IS ORDERED that the petition be, and it is hereby, denied.

Clement F.Haynsworth,
Senior Circuit Judge
December 27, 1983

APPENDIX F

Title 28, United States Code, §1346(b) provides as follows:

> "Subject to the provisions of Chapter 171 of this Title, the District Courts, together with the Inited States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have dexlusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for the injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28, United States Code, §2674, provides as follows:

> "The United States shall be liable, repecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interests prior judgement or for punitive damages.
>
> If however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Office - Supreme Court, U.S.
FILED
MAY 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1572

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM FLANNERY, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a permanently and totally comatose plaintiff may recover damages under the Federal Tort Claims Act for loss of the ability to enjoy life.

2. Whether damages for lost future earnings awarded in a suit under the Federal Tort Claims Act must be adjusted to reflect the federal income taxes to which future earnings would have been subject.

3. Whether, in the circumstances of this case, the damages awarded for lost future earnings and the damages awarded for all future living expenses were impermissibly duplicative.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Brooks v. *United States*, 273 F. Supp. 619	11
D'Ambra v. *United States*, 481 F.2d 14, cert. denied, 414 U.S. 1075	5, 6
Deweese v. *United States*, 576 F.2d 802	9
Downs v. *United States*, 522 F.2d 990	9
Felder v. *United States*, 543 F.2d 657	5, 9, 11
Harden v. *United States*, 688 F.2d 1025	9, 11
Hartz v. *United States*, 415 F.2d 259	5
Hollinger v. *United States*, 651 F.2d 636	5, 9
Jones & Laughlin Steel Corp. v. *Pfeifer*, No. 82-131 (June 15, 1983)	10
Kalavity v. *United States*, 584 F.2d 809	6, 8, 9, 10, 11
Mosley v. *United States*, 538 F.2d 555	11
Norfolk & Western Ry. v. *Liepelt*, 444 U.S. 490	10
O'Connor v. *United States*, 269 F.2d 578	9
Richards v. *United States*, 369 U.S. 1	5
Willinger v. *Mercy Catholic Medical Center*, 482 Pa. 441, 393 A.2d 1188	8

Statutes:

Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*	10
Federal Tort Claims Act, 28 U.S.C. 2674	3, 5
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904	10

Miscellaneous: **Page**

Comment, *Loss of Enjoyment of Life—Should it be a Compensable Element of Personal Injury Damages?*, 11 Wake Forest L. Rev. 459 (1975).. 8
Note, *Nonpecuniary Damages for Comatose Tort Victims*, 61 Geo. L.J. 1547 (1973) 8

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 718 F.2d 108. The memorandum opinion of the district court (Pet. App. 36a-46a) is not reported. A prior opinion of the court of appeals certifying certain questions of state law to the West Virginia Supreme Court of Appeals (Pet. App. 30a-35a) is reported at 649 F.2d 270. The opinion of the state court (Pet. App. 15a-29a) is reported at 297 S.E.2d 433.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1983. A petition for rehearing was denied on December 27, 1983 (Pet. App. 47a). The

petition for a writ of certiorari was filed on March 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the legal representative for Michael George Flannery (Flannery). As the result of a 1974 collision between an automobile in which Flannery was riding and a vehicle driven by a federal employee, Flannery suffered extensive brain damage that rendered him permanently and totally comatose. Petitioner filed suit on Flannery's behalf under the Federal Tort Claims Act (FTCA or the Act) in the United States District Court for the Southern District of West Virginia. The district court determined that the accident was caused by the negligence of the federal employee and awarded petitioner approximately $2,200,000 in damages. Pet. App. 2a, 36a.

The United States appealed only with respect to the amount of damages awarded. Specifically, the government challenged the $1,300,000 portion of the award attributable to Flannery's "loss of the ability to enjoy life" and the district court's refusal to reduce the $535,855 awarded for impairment of Flannery's earning capacity by the amount of taxes that would have been payable on that amount of income. The government argued that both of these aspects of the award represented damages that were improper under state law, excessive and punitive.

2. The court of appeals initially certified the questions of state law raised by the government's appeal to the West Virginia Supreme Court of Appeals (Pet. App. 30a-35a). The state court ruled that both elements of the damages award challenged by the government were recoverable under West Virginia

law (*id.* at 15a-29a). Following the state court's response, however, the court of appeals concluded (*id.* at 2a) that it "should have first addressed the federal questions lurking in the case." Specifically, the court of appeals acknowledged (*id.* at 3a) that a determination that a certain element of damages would be recoverable against a private defendant under state law does not answer definitively the question whether the United States may be held liable for the same element of damages under the FTCA. Rather, there remains the question whether the particular damages are punitive in nature, and therefore not recoverable under the FTCA pursuant to 28 U.S.C. 2674. The court of appeals concluded that the damages awarded by the district court violated the FTCA's proscription of punitive damages in the following three respects:

First, the court of appeals held (Pet. App. 4a-5a), because Flannery "is conscious of nothing and incapable of enjoying anything" (*id.* at 4a), and because "[t]here is no likelihood whatever that he will ever become aware of anything" (*ibid.*), the award of $1,300,000 for the loss of the ability to enjoy life is punitive and therefore not permitted under the FTCA. The court explained (*id.* at 4a-5a) that such damages "cannot provide [Flannery] with any consolation or ease any burden" and are superfluous because he already has been awarded "all of the money needed for [his] care, should he live out his life expectancy. He cannot use the $1,300,000. He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away. If paid, the money would be invested and the income accumulated until Flannery's death, when it would be distributed to those surviving relatives of his entitled to inherit from him."

Second, the court of appeals held (Pet. App. 4a) that because "[a] living person, with earnings subject to federal taxation, may spend only his net income after taxes, * * * an award to a plaintiff for lost future earnings based upon lost gross earnings gives the plaintiff more than is truly compensatory." Accordingly, the court of appeals remanded the case to the district court with directions to adjust the damages awarded for impairment of Flannery's earning capacity to reflect that his loss is net income after taxes, not gross income (*id.* at 6a).

Third, although the government had not raised the issue on appeal, the court of appeals held (Pet. App. 7a-8a) that, because of the particular way in which the district court had calculated Flannery's "medical" expenses, that award impermissibly duplicated the award for lost future earnings. As the court of appeals noted (*id.* at 7a), included in the damages awarded by the district court for future "medical" expenses was "a sum calculated to provide for [Flannery's] living expenses throughout the remainder of his life." Accordingly, the court held (*id.* at 7a-8a), inasmuch as damages for lost future earnings are awardable "to an incapacitated plaintiff so that he may provide for himself * * * those necessities, comforts and niceties he would have provided out of his earned income had he not been injured," the district court's judgment, which included both elements of damages, improperly required the government "to pay [Flannery's] personal living expenses twice."

Judge Hall dissented (Pet. App. 9a-14a), largely on the ground (*id.* at 9a) that the "aspects of the damages award [challenged by the government] are a matter of state law." The dissent also was unconvinced that, as a matter of fact, "the award for lost

future earnings duplicates in part the award of future medical expenses" (*id.* at 13a).

ARGUMENT

The decision of the court of appeals is correct and entirely consistent with the purposes of the Federal Tort Claims Act. Moreover, the court's decision does not conflict with any holding of this Court or of any other court of appeals. Further review of this unusual case therefore is not warranted.

1. "[N]otwithstanding the generally interstitial character of the [FTCA], Congress, in waiving the immunity of the Government for tortious conduct of its employees, * * * imposed restrictions and conditions on the extent and substance of its liability." *Richards* v. *United States*, 369 U.S. 1, 7 (1962) (footnote omitted). One such restriction is that the government "shall not be liable for * * * punitive damages" (28 U.S.C. 2674). The court below followed the lead of other courts of appeals in concluding (Pet. App. 4a) that the prohibition of punitive damages in suits under the Act proscribes "an award [that] gives more than the actual loss suffered by the claimant." Accord, *Hollinger* v. *United States*, 651 F.2d 636, 642 (9th Cir. 1981); *Felder* v. *United States*, 543 F.2d 657, 668-669 (9th Cir. 1976); *D'Ambra* v. *United States*, 481 F.2d 14, 16-17 (1st Cir.), cert. denied, 414 U.S. 1075 (1973); *Hartz* v. *United States*, 415 F.2d 259, 264-265 (5th Cir. 1969).

The court of appeals relied in particular (Pet. App. 3a) on the First Circuit's reasoning in *D'Ambra*. *D'Ambra* involved an action under the FTCA brought by parents for the wrongful death of their four-year-old child in Rhode Island. Under the Rhode

Island statute, the parents were permitted to recover an amount equal to the estimated gross earnings of the child over his lifetime undiminished by the expenses he would have incurred on account of his anticipated dependents (481 F.2d at 16). Because the parents "would not have been the hypothesized wife and children to receive such earnings" (*ibid.* (footnote omitted)) and because, in any event, the gross earnings far exceeded the amount that would in fact have been available had the child survived, the court of appeals held that the award was prohibited by the FTCA, by which Congress had not intended "to accept liability over and above compensating the survivors to the extent of their loss" (*ibid.*).

Applying this principle to the particular facts of the instant case, the court of appeals correctly concluded (Pet. App. 4a-5a) that the award of $1,300,000 for the loss of the ability to enjoy life was not compensatory in nature. Where, as in this case, special damages have provided all of the money needed for a comatose plaintiff's maintenance and care, and recompensed fully his pecuniary losses, general damages can only be invested to draw income until the plaintiff's death, at which time they become a windfall to his heirs.

Contrary to petitioner's assertion (Pet. 7), there is no conflict between the decision below and *Kalavity* v. *United States*, 584 F.2d 809 (6th Cir. 1978). First, the question presented in *Kalavity* was an entirely different one, *i.e.*, whether the FTCA required that the amount of damages awarded to a widow for loss of her husband's support be reduced by the value of the support she "has or will receive by virtue of her subsequent remarriage" (584 F.2d at 810). Moreover, in holding that no reduction was required, the

court of appeals relied (*id.* at 811) on the fact that in calculating damages in tort "courts often exclude from consideration certain particular facts or uncertain future events in favor of a principle of uniformity." In particular, the court emphasized (*ibid.*) the difficulty that would be encountered by courts in applying such a rule, arising largely out of the speculative nature of the inquiry:

> [The court] would then have to consider the stability of the present marital or living arrangement, the strength of the relationship, the health of the new husband, the likelihood of death or separation, the amount of money the new partner contributes, the value of his companionship as compared to the deceased husband's. If the survivor is not yet remarried, the court or jury would have to consider her age, appearance and personality, her desire to marry again, and her chances of finding a marriage partner. The court or jury would also have to consider whether the survivor is telling the truth or simply trying to get a larger damage award if she says she will never remarry. Courts do not award "punitive" damages under the Tort Claims Act when they refuse to reduce damages by taking these kinds of considerations into account.

Finally, even assuming that the Sixth Circuit was correct in taking account of such factors as the difficulty of the damages calculation in determining whether certain types of damages are punitive, such an analysis would not yield a different result in this case. No uncertainty or speculation is involved in the elimination from recovery on behalf of a permanently comatose plaintiff of damages attributable to his loss of the ability to enjoy life.

Petitioner suggests (Pet. 7), however, that there is a conflict in principle between the court of appeals' construction of the FTCA's proscription of punitive damages as restricting recovery under the Act to "awards that compensate or reimburse" (Pet. App. 4a) and the *Kalavity* court's view (584 F.2d at 811 (footnote omitted)) that the FTCA does not mandate "a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together." But even the latter view does not avail petitioner, since damages awarded to a permanently comatose plaintiff for loss of the ability to enjoy life are hardly "customary * * * under traditional tort law principles" (*ibid.*).

To the contrary, there is no American precedent for awarding damages for loss of ability to enjoy life to a permanently and totally comatose plaintiff. See Note, *Nonpecuniary Damages for Comatose Tort Victims*, 61 Geo. L.J. 1547, 1556 (1973). Although a number of jurisdictions allow general damages to be awarded under rubrics other than the traditional category of pain and suffering, all have limited such damages to compensation for a plaintiff's "emotional sense of loss." Comment, *Loss of Enjoyment of Life —Should it be a Compensable Element of Personal Injury Damages?*, 11 Wake Forest L. Rev. 459, 470 (1975). Cf., *e.g.*, *Willinger* v. *Mercy Catholic Medical Center*, 482 Pa. 441, 447, 393 A.2d 1188, 1191 (1978) (survivor not entitled to damages for decedent's loss of ability to enjoy life because "it has been the plaintiff's consciousness of his or her inability to enjoy life that we have compensated under the rubric of 'loss of life's pleasures' "). The West Virginia Supreme Court of Appeals' ruling that damages for loss

of the ability to enjoy life are recoverable on behalf of a permanently comatose plaintiff thus is apparently unique among American jurisdictions.[1] While it surely was within the province of that court to adopt such a rule as a matter of state law, this rule of recovery equally as surely cannot be characterized as "customary damages awarded under traditional tort law principles," *Kalavity*, 584 F.2d at 811, even if that were the controlling criterion for recovery under the FTCA.

2. The decision below also presents no conflict among the circuits concerning the question whether damages for lost future earnings awarded under the FCTA should be reduced by the amount of income taxes such earnings would have borne. To the contrary, both of the other courts of appeals that have squarely considered the question whether the failure to make such an adjustment constitutes an award of punitive damages have agreed with the court below (Pet. App. 4a-6a) that it does. See *Harden* v. *United States*, 688 F.2d 1025, 1029-1030 (5th Cir. 1982); *Hollinger* v. *United States*, 651 F.2d at 642; *Felder* v. *United States*, 543 F.2d at 669-670.[2]

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[1] We note that, in holding as it did, the West Virginia Supreme Court of Appeals cited no other decision to the same effect.

[2] Other courts of appeals also have held that damages for lost earnings awarded under the FTCA should be reduced by the amount of income taxes that would have been incurred, but they apparently have done so on the ground that state law required such an adjustment without reaching the question whether the FTCA's ban on punitive damages mandated the same result. See, *e.g.*, *Deweese* v. *United States*, 576 F.2d 802, 808-809 (10th Cir. 1978); *Downs* v. *United States*, 522 F.2d 990, 1005 (6th Cir. 1975); *O'Connor* v. *United States*, 269 F.2d 578, 584-585 (2d Cir. 1959).

Petitioner's reliance (Pet. 8) on *Kalavity* v. *United States*, *supra*, is misplaced in this context as well. First, the court in *Kalavity* concluded that the damages award should not be reduced by the amount of income taxes the decedent would have been required to pay without even discussing the punitive nature of such an award. See 584 F.2d at 812-813. Moreover, the Sixth Circuit's decision in *Kalavity* predated this Court's decisions in *Norfolk & Western Ry.* v. *Liepelt*, 444 U.S. 490, 493-496 (1980), and *Jones & Laughlin Steel Corp.* v. *Pfeifer*, No. 82-131 (June 15, 1983), slip op. 10, which held that damages for lost future earnings awarded under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 904, must be reduced to reflect income tax liability. Although this Court's construction of the amount of damages recoverable under other statutes is not strictly controlling in the FTCA context, it is far from certain that the Sixth Circuit would reach the same result today, in view of the analysis employed in *Kalavity* (584 F.2d at 812-813). Finally, even the *Kalavity* court suggested (*id.* at 813) that the rule stated therein would be limited to the " 'lower or middle reach of the income scale' "; the decedent in that case earned $6,600 per year at the time of his death in 1967 and, according to the court's estimate, would have been earning $12,800 per year at the time of trial (*ibid.*). By contrast, the projections accepted by the district court in this case indicated that Flannery would have earned from $17,481 in 1978 to $182,795 in 2017 (Pet. App. 6a). In these circumstances, it cannot be said that the Sixth Circuit would have decided this case differently, even if

Kalavity remained the controlling law in that circuit.[8]

Petitioner further contends (Pet. 8-9) that the government's evidentiary showing was insufficient to justify the court of appeals' conclusion that the damages for lost future earnings must be adjusted by 10% to reflect income taxes. This factual argument plainly is not worthy of this Court's review. In any event, the court of appeals' reasoning on this point is persuasive (see Pet. App. 6a), and the 10% adjustment suggested by the government—an adjustment described by the court below as "a very conservative estimate" (*ibid.*)—is consistent with the methodology that has been employed in other cases. See *Mosley* v. *United States*, 538 F.2d 555, 558 (4th Cir. 1976) (rate not challenged by either party on appeal); *Brooks* v. *United States*, 273 F. Supp. 619, 632 (D.S.C. 1967).

3. Petitioner's final argument (Pet. 9) is based on a misapprehension of the court of appeals' holding. Contrary to petitioner's assertion (Pet. 9 (emphasis by petitioner)), the decision below does not question that "future medical expenses and the impairment of earning capacity are proper *separate* elements of recovery." Rather, the court of appeals sim-

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[8] As the *Kalavity* court noted (584 F.2d at 813), in *Felder* v. *United States*, *supra*, the Ninth Circuit did not disavow its prior decisions in which income taxes were not deducted from lost earnings in the " 'lower or middle range of the income scale' " (543 F.2d at 670). However, while the projected incomes of the decedents in *Felder* ranged between $30,000 and $125,000 (*id.* at 669), the court made clear (*id.* at 670) that a yearly income of $15,000 "would fall near the top" of this lower or middle range. See also *Harden* v. *United States*, 688 F.2d at 1030 n.3 (reduction for income taxes required where decedent's annual future earnings estimated at $12,500).

ply held (Pet. App. 7a-8a) that "[t]he label should not be permitted tc mislead us," and that where, as in the peculiar circumstances of this case, one particular basis for damages (personal living expenses) already was included within one of the above elements (future medical expenses), it should not be duplicated under the other (*ibid.*). In short, the court of appeals held that the district court had awarded duplicative damages by miscalculating, not that the elements of damages were intrinsically redundant.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Although the dissent questioned whether, as a matter of fact, the damages awards actually were duplicative (Pet. App. 13a-14a), this issue plainly does not merit the Court's intervention.

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